

1 IN THE UNITED STATES DISTRICT COURT

2 IN AND FOR THE DISTRICT OF DELAWARE

3 - - -

4 UNITED STATES OF AMERICA, : CRIMINAL ACTION  
5 :  
6 Plaintiff, :  
7 :  
8 vs. :  
9 :  
10 FRANK FORCE KESTING, :  
11 :  
12 Defendant. : NO. 07-94 (SLR)

13 - - -  
14 BEFORE: HONORABLE SUE L. ROBINSON, U.S.D.C.J.  
15 - - -  
16 APPEARANCES:  
17 EDMOND FALGOWSKI, ESQ.,  
18 Assistant United States Attorney  
19 Counsel for Plaintiff  
20  
21 EDSON A. BOSTIC, ESQ.,  
22 Federal Public Defender  
23 Counsel for Defendant  
24 Valerie J. Gunning  
25 Official Court Reporter

1 P R O C E E D I N G S  
23 (Proceedings commenced in the courtroom, beginning at  
4 10:30 a.m.)  
56 MR. FALGOWSKI: Good Edmond Falgowski, for the  
7 United States. Good morning, your Honor.8 The United States moves the sentencing of Frank  
9 Force Kesting.

10 THE COURT: All right. Thank you very much.

11 As is consistent with my practice, I will go  
12 through the sentencing guidelines first, and before I even  
13 do that, I will ask the defendant, Mr. Kesting, if he has  
14 had the opportunity to review the presentence investigation  
15 report with his attorney, Mr. Bostic?

16 THE DEFENDANT: Yes, your Honor.

17 THE COURT: All right. The defendant pled  
18 guilty to a count charging him, a count of indictment, Count  
19 6, charging him with possession of child pornography, a  
20 violation of Title 18 of the United States code, Section  
21 2252A(a)(5)(B) and (b)(2).22 The maximum penalty that could be imposed by  
23 statute include a term of imprisonment up to ten years,  
24 followed by a lifetime of supervised release, a fine of up  
25 to \$250,000, and a \$100 special assessment.

1                   Under the sentencing guideline, the base offense  
2 level for this offense is an 18. There's an upward  
3 adjustment of two levels because the material involved in  
4 the offense involved a prepubescent minor or minor who had  
5 not attained the age of 12.

6                   There's another upward adjustment two levels  
7 because the offense involved the use of a computer for the  
8 possession, transmission, receipt or distribution of child  
9 pornography.

10                  And, finally, there's an upward adjustment,  
11 another upward adjustment of two levels, because the offense  
12 involved at least ten, but fewer than 150, images. That  
13 gives us an adjusted offense level of 24.

14                  There is a downward adjustment of three levels  
15 for the defendant's acceptance of responsibility, which  
16 gives us a total offense level of 21.

17                  The defendant has no prior criminal history and  
18 so has been assigned a criminal history category of Roman  
19 Numeral I.

20                  With a total offense level of 21 and a criminal  
21 history category of Roman Numeral I, the guidelines would  
22 call for a period of incarceration of from 37 to 46 months,  
23 supervised release of from five years to life, a fine of  
24 from \$7,500 to \$75,000, and a \$100 special assessment.

25                  There have been no objections filed to the

1 report. And I note for the record that I have reviewed  
2 Mr. Bostic's sentencing memorandum as well as the evaluation  
3 submitted in connection with that memorandum.

4 With that, I'm going to ask the government if it  
5 has a recommendation and then we'll have the defendant and  
6 his counsel approach.

7 MR. FALGOWSKI: The United States recommends  
8 41 months incarceration, which is just a little shy of the  
9 middle guideline range.

10 The evaluation submitted by the defendant's  
11 mental health expert reports that Mr. Kesting is unwilling  
12 or unable to own up to his relevant conduct and fantasies.  
13 The report further indicates that this is important for  
14 treatment purposes.

15 Accordingly, the United States submits that  
16 successful treatment of the defendant with that prognosis is  
17 guarded. The reason that the United States does not  
18 recommend a sentence at the high end of the guideline range  
19 is that unlike many of the others, most of the others  
20 defendants in these related cases that chatted on-line with  
21 Paul Thielemann, the defendant was one of the few that did  
22 not encourage Paul Thielemann, did not condone that  
23 Paul Thielemann molest children.

24 When he was on-line, Paul Thielemann would say  
25 that he had access to prepubescent children and what the

1 defendant -- what Mr. Kesting did not do, he did not  
2 encourage Thielemann to molest. Indeed, Thielemann did not  
3 have such access, but others condoned, encouraged,  
4 Thielemann to abuse those children and take pictures and  
5 send them pictures. But the defendant didn't engage in that  
6 type of conduct.

7 And that's the reason the United States does not  
8 recommend a sentence at the high end of the range despite  
9 the defendant's failure to recognize his problem.

10 THE COURT: All right. Thank you very much.

11 Mr. Bostic, if you and Mr. Kesting would come  
12 forward, then.

13 MR. BOSTIC: Thank you, your Honor. Good  
14 morning again.

15 THE COURT: Good morning.

16 MR. BOSTIC: Your Honor, we would start off by  
17 noting that in the courtroom today we have Leslie Kesting,  
18 the defendant's aunt, with whom he lived for most of his  
19 adult life until he moved out on his own. We also have his  
20 brother, with whom he also lived, and his father, Frank  
21 Kesting. They are here today as well as a family friend,  
22 Erin McCarthy.

23 Needless to say, your Honor, this shows support  
24 for Mr. Kesting in the community, and it's reflective, to  
25 some degree, as to who this young man was before this

1 incident.

2                   He had a lot of things going against him as he  
3 tried to traverse life. The Court -- I'm not going to get  
4 into Dr. Turner's report in any detail or my sentencing  
5 memo, because the Court is well aware of nature of his  
6 background, his own victimization and difficulty dealing  
7 with issues of a dysfunctional family. But, needless to  
8 say, it's important to note that that victimization came at  
9 the hands of people who were supposed to protect and care  
10 for this young man.

11                  Dr. Turner talks about the blend of fantasy  
12 and reality in terms of Mr. Kesting's world and the ongoing  
13 chronic major depression or bouts of major depression that  
14 he has dealt with, apparently without any treatment.

15                  There are other diagnoses that obviously play  
16 into who he is presently, and the government is right as to  
17 whether or not Mr. Kesting is ready to own up to and  
18 understand and appreciate the wrongfulness of his act.

19                  And Dr. Turner noted, I don't believe this is an  
20 individual who is just making a full assessment of the  
21 situation and saying, Well, I did nothing wrong. He has  
22 admitted that he did something wrong. The gap that we need  
23 to bridge is dealing with the mental health issues to help  
24 him come to a full realization of the complete wrongness  
25 that he did, and helping him understand that he, while he

1 was a victim, these children also are victims and ongoing  
2 victims.

3                   And I've had numerous conversations with  
4 Mr. Kesting, and from day one to where he is now, there is  
5 growth and development in understanding, accepting that part  
6 of this case.

7                   Your Honor, when you look at his youthfulness  
8 not only in terms that he's 26 years old chronologically,  
9 but I would suggest to the Court that his mental age is less  
10 than that. And I believe that's a factor also that should  
11 be considered.

12                  I think that a sentence at the bottom or  
13 slightly below the guideline range would be an appropriate  
14 sentence here because for some of the points that the  
15 government said also, he wasn't encouraging the behavior  
16 that Mr. Thielemann wanted to lead others down the path to,  
17 and I think that shows some maturity and some growth and  
18 some understanding of how people can be victimized.

19                  It's going to require a lot of work, and  
20 Dr. Turner said that in his own report to the Court. There  
21 needs to be close supervision and intensive therapy and work  
22 on Mr. Kesting's behalf and his willingness to participate  
23 in that work.

24                  With all that in mind, your Honor, I ask this  
25 Court to engage in the difficult task of finding the right

1 sentence to impose upon Mr. Kesting, but I do truly believe  
2 that this is one individual that the Court should take all  
3 the 3553 factors in mind, his personal history and  
4 characteristics, as well as the lack of any prior criminal  
5 activity, impose a sentence at the bottom or slightly below  
6 the guideline range.

7                   Mr. Kesting would like to address this Court.

8                   THE COURT: All right. Before he does, I  
9 generally give the government, Mr. Falgowski, an opportunity  
10 to respond to your remarks, Mr. Bostic's, if there's  
11 anything further.

12                  MR. FALGOWSKI: Nothing further, Judge.

13                  THE COURT: All right. Thank you.

14                  And Mr. Kesting?

15                  THE DEFENDANT: I'd like to openly tell the  
16 Court, apologize to the victims and the Court that were  
17 affected by my actions in the past.

18                  I did not realize that children were victims of  
19 myself when I was victimized as an adult, as a child. Every  
20 time these images are looked at, these children are once  
21 again victimized. Dr. Turner helped me see all of this, to  
22 understand how wrong my past actions were, and even though  
23 we are victimized in different ways, the effects of our --  
24 the way it affects our lives are similar.

25                  With help of Dr. Turner, I understand why I've

1       been incarcerated. I have been incarcerated for nine months  
2       today and have had over 680 hours to think of so many what  
3       ifs, could haves and should haves of my past actions, and  
4       the time I spent in my cell, examined my life thoroughly,  
5       and never want to be that person again. I will not allow  
6       myself to commit a crime or be incarcerated for breaking the  
7       law.

8                  I want to ask for all the help, therapy,  
9       counseling, and all the proper steps towards full  
10      rehabilitation. I want to do all I can to be sure no other  
11      children are victimized like these children or myself have  
12      been.

13                 What I did was wrong. I now understand that and  
14      I want to do all I can to keep it from happening to someone  
15      else.

16                 I am sorry for all I have done and for all the  
17      actions. I ask the victims, their families and the Court  
18      that are all affected by my actions of the past to forgive  
19      me. I am sorry. I never want to hurt any person or child  
20      again. I will never act this way again.

21                 I ask the Court to address my actions with mercy  
22      and leniency.

23                 MR. BOSTIC: Your Honor, may I add one other  
24      thing? As I said, this has been a work in progress, and I  
25      think one of the things that shows the dichotomy of what's

1 going on with Mr. Kesting, and perhaps help him to come to  
2 this realization with Dr. Turner's work, Dr. Turner went and  
3 saw him on three different occasions, and I think one  
4 slightly afterwards, just before he wrote the report. But  
5 about three, four weeks ago, I got a frantic call from his  
6 aunt, and then from Mr. Kesting, about the fact that he was  
7 placed in a cell with an individual who he describes as a  
8 predator and the fear that he had of being with that  
9 individual.

10                   And I think that -- and the facility where he is  
11 moved very quickly to separate the two. But I think that  
12 that shows what's going on with Mr. Kesting, and I think  
13 that helped to bring him front and center to deal with these  
14 issues and understand that these children were victims and  
15 that he, as a former victim himself, needs to work harder to  
16 make sure he doesn't victimize anyone else.

17                   Thank you, your Honor.

18                   THE COURT: All right. I certainly have  
19 reviewed all the background material we've had available for  
20 this defendant consistent with my responsibilities under  
21 Title 18 of the United States Code, Section 3553(a). I've  
22 also compared this case with the many, unfortunately, other  
23 cases that I have had to deal with, including involving the  
24 receipt, possession, distribution of child pornography.

25                   I do appreciate the government's recognition

1       that, compared to many of the other folks, this defendant,  
2       Mr. Kesting, did not encourage or condone the further  
3       victimization that Mr. Thielemann managed to impose, and I  
4       also recognize that this defendant is, in addition to his  
5       youth, has a background, I think significantly different  
6       than many of our other defendants, having been a victim  
7       himself, and coming from a less than easy family background,  
8       and yet getting through school and working consistently, and  
9       having no criminal background.

10           So I think for all of these reasons that a  
11       sentence at the low end of the guideline range is the most  
12       appropriate, taking into consideration all those factors I  
13       need to.

14           Therefore, pursuant to the Sentencing Reform Act  
15       of 1984, it is the judgment of the Court that the defendant,  
16       Frank -- is it Force?

17           MR. BOSTIC: Force.

18           THE COURT: Frank Force Kesting is hereby  
19       committed to the custody of the Bureau of Prisons to be  
20       imprisoned for a term of 37 months.

21           The Court has considered all of the factors set  
22       forth under Title 18 of the United States Code, Section  
23       3553(a), and finds the sentence to be reasonable and  
24       appropriate.

25           Based on the serious nature of the offense and

1 characteristics of this defendant, the sentence promotes  
2 deterrence and respect for the law and provides just  
3 punishment, and I believe still avoids unwanted sentencing  
4 disparities among defendants with similar records who have  
5 been found guilty of similar conduct in the court.

6                 Upon release from imprisonment, Mr. Kesting,  
7 you shall be placed on supervised release for a term of  
8 five years. And I understand that serving time incarcerated  
9 is going to be very difficult, but trust me when I say that  
10 the harder part of the sentence might come with supervised  
11 release, where the words that you gave me today about  
12 changing your life and understanding that there are some  
13 issues you need to deal with, you have to demonstrate that  
14 you mean those words. And so it's not going to be an easy  
15 time, and I hope that with the resolve that you showed your  
16 family and the Court today is in place when you start your  
17 supervised release.

18                 Within 72 hours of release from the custody  
19 of the Bureau of Prisons, you shall report in person to  
20 the Probation Office in the district to which you are  
21 released.

22                 While on supervised release, you shall not  
23 commit another federal, state or local crime. You shall  
24 comply with the standard conditions that have been adopted  
25 by this Court and shall comply with the following additional

1 conditions.

2 You shall not illegally possess a controlled  
3 substance. You shall not possess a firearm, ammunition, or  
4 destructive device. You shall cooperate in the collection  
5 of DNA as directed by the probation officer, and you shall  
6 provide the probation officer with access to any requested  
7 financial information.

8 You shall participate in a mental health  
9 treatment program, which may include sex offender therapy  
10 at the direction of the probation officer.

11 You shall register with the State Sex Offender  
12 Registration Office in the state where you reside, work, or  
13 are a student, as directed by the probation officer.

14 You shall submit to random polygraph  
15 examinations on subjects relating to monitoring,  
16 supervision, and treatment, and your treatment, at the  
17 direction of the probation officer. Such examination shall  
18 be administered by a certified examiner.

19 You shall be required to contribute to the costs  
20 of the polygraph examinations to the extent you have the  
21 ability to pay.

22 You shall not own or operate a personal computer  
23 with Internet access in the home or in any other location,  
24 including employment, without prior written approval of the  
25 probation officer.

1                   You shall not reside within 500 feet of a  
2 school, playground, or daycare office without prior  
3 permission. There actually are some small towns in Delaware  
4 where it's virtually impossible to live without being within  
5 500 feet, so I add that caveat.

6                   You shall not visit or live in a residence where  
7 there are children present without third-party notification  
8 and without prior approval of the Court.

9                   You shall not invite or otherwise encourage  
10 anyone under the age of 18 to visit your living quarters.

11                  You are restricted from engaging in any  
12 occupation, profession, business or activity that includes  
13 contact with children without prior written permission from  
14 the Court. At the direction of the probation officer, you  
15 shall disclose the nature of your conviction to any such  
16 occupation, business, profession or activity that includes  
17 contact with children.

18                  You shall not possess or view any materials,  
19 including pictures, photographs, books, writings, drawings  
20 or video games depicting and/or describing sexually explicit  
21 conduct as defined in Title 18 of the United States Code,  
22 Section 2256(2).

23                  You shall not associate with anyone who is a  
24 known sexual offender, except in a registered treatment  
25 program.

1                   The Court finds that you do not have the ability  
2 to pay a fine and therefore the Court will waive the fine in  
3 this case. However, it is ordered that you shall pay to the  
4 United States the special assessment of \$100, which shall be  
5 due immediately.

6                   And I tell you for purposes of the record that  
7 you have ten days from the date judgment is entered to  
8 appeal this sentence.

9                   Mr. Falgowski, are there any other issues that  
10 we need to address?

11                  MR. FALGOWSKI: Your Honor, I have a motion and  
12 order to dismiss the remaining counts of the indictment. If  
13 I may approach?

14                  THE COURT: Yes, you may, and I will certainly  
15 sign off sign off on that.

16                  Mr. Bostic, anything else?

17                  MR. BOSTIC: No, your Honor.

18                  THE COURT: Thank you very much, then.

19                  (Court recessed at 10:53 a.m.)

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